

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JAMES D. WILKS,)

11 Plaintiff,)

12 v.)

13 KING COUNTY, *et al.*,)

14 Defendants.)
15

CASE NO. C07-1504-MJP-JPD

REPORT AND RECOMMENDATION

16 Plaintiff James Wilks is a county prisoner who is incarcerated at the King County
17 Correctional Facility (“KCCF”) in Seattle, Washington. He brings this civil rights action under 42
18 U.S.C. § 1983 to allege violations of his constitutional rights by three members of the Seattle Police
19 Department, Officers Merry O’Cleary, Chriseley Lang and P.J. Fox (“the City defendants”), and one
20 employee of the KCCF, Sergeant Rachel Wilks.¹ Plaintiff seeks damages in the amount of \$5 million
21 for his pain and suffering and for the violation of his civil rights.

22 The City Defendants have filed a motion seeking dismissal of this action or, in the alternative,
23 summary judgment. Defendant Wilks has filed a motion for summary judgment and dismissal.

24
25 ¹ Plaintiff Wilks and Sergeant Wilks are not related.

1 Plaintiff has not filed a response to either motion.² Following a careful review of defendants'
2 motions, and the balance of the record, this Court concludes that the City defendants' motion to
3 dismiss should be denied, the City defendants' motion for summary judgment should be granted³, and
4 defendant Wilks' motion to dismiss should be granted.

5 DISCUSSION

6 Plaintiff alleges in his complaint that Officers O'Cleary and Lang violated his rights when, on
7 August 26, 2007, they entered his tent and dismantled it, when they placed him under arrest, and
8 when Officer Lang used excessive force in effectuating his arrest. Plaintiff also alleges that Officer
9 Fox violated his rights when, on August 24, 2007, he threatened to arrest plaintiff if plaintiff did not
10 turn over property in his possession to another individual and when Officer Fox told plaintiff that he
11 could not go to Occidental Park as he had intended to do, and ordered plaintiff instead to take his
12 belongings and go under the viaduct. Plaintiff maintains that the camp he set up under the viaduct, in
13 accordance with Officer Fox's directive, was the camp later destroyed by Officers O'Cleary and
14 Lang. As to Sergeant Wilks, plaintiff alleges that this defendant violated his rights when, on August
15 26, 2007, she ordered that plaintiff be "dressed-out" in a white ultra-security uniform upon being
16 booked into the KCCF. Plaintiff further alleges that defendant Wilks improperly removed items from
17 his cell during a cell search, and that she caused him to be subjected to various unconstitutional
18 conditions of confinement.

19 The City defendants move for dismissal of the complaint under Rule 41(b) of the Federal
20 Rules of Civil Procedure based upon plaintiff's failure to prosecute this action. The City defendants

22 ² Plaintiff has been advised of the summary judgment requirements pursuant to *Rand v.*
23 *Rowland*, 154 F.3d 952 (9th Cir. 1998). (See Dkt. No. 22 at 2.)

24 ³ The City defendants' motion for summary judgment is, in effect, a motion for partial
25 summary judgment because it does not address all claims alleged against them in plaintiff's
26 complaint.

1 move, in the alternative, for summary judgment on plaintiff's claim that defendants O'Cleary and
2 Lang violated his Fourth Amendment rights by handcuffing and detaining him on August 26, 2007,
3 and on plaintiff's claims against defendant Fox. Defendant Wilks moves for dismissal of plaintiff's
4 claims based upon plaintiff's failure to exhaust his administrative remedies. She moves, in the
5 alternative, for dismissal of plaintiff's claims based upon plaintiff's failure to state a claim upon
6 which relief may be granted.

7 Failure to Prosecute

8 The City defendants first argue that they are entitled to dismissal of plaintiff's complaint, with
9 prejudice, because plaintiff has failed to prosecute this action. Defendants assert that such a
10 disposition is appropriate because plaintiff was aware that he had an obligation to move this action
11 toward trial, plaintiff has taken no action in this matter since filing his complaint in September 2007,
12 and plaintiff has not prevailed on any of the cases he has previously filed against King County or the
13 City of Seattle.

14 The Ninth Circuit has made clear that "[d]ismissal is a harsh penalty and is to be imposed
15 only in extreme circumstances." *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). A
16 district court must consider five factors in evaluating a motion to dismiss for failure to prosecute: "(1)
17 the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket;
18 (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their
19 merits; and (5) the availability of less drastic sanctions." *Henderson*, 779 F.3d at 1423. This Court,
20 having considered the five *Henderson* factors, concludes that this case does not present exceptional
21 circumstances of unreasonable delay which warrant dismissal based upon plaintiff's failure to
22 prosecute.

1 Plaintiff submitted his complaint to this Court for filing in September 2007. Because of a
2 deficiency in plaintiff's application to proceed *in forma pauperis* ("IFP"), the complaint was not filed
3 immediately. Plaintiff corrected the IFP deficiency in October 2007, and plaintiff's IFP application
4 was granted and his complaint was filed on November 14, 2007. (*See* Dkt. Nos. 5, 6 and 7.) The
5 Court ordered plaintiff's complaint served on defendants on the same date. (Dkt. No. 8.) Sergeant
6 Wilks and the City defendants filed their answers to the complaint on January 11, 2008, and January
7 22, 2008, respectively. On February 11, 2008, this Court issued an Order Regarding Pretrial
8 Preparations in which it established a discovery deadline of May 12, 2008, and a dispositive motion
9 filing deadline of June 12, 2008. (Dkt. No. 22.)

10 On May 9, 2008, defendant Wilks filed a motion seeking to stay these proceedings based on
11 plaintiff's incompetency.⁴ On June 12, 2008, the parties filed the currently pending dispositive
12 motions and, on June 19, 2008, this Court issued an Order granting defendant Wilks' motion to stay
13 these proceedings. The stay was lifted on September 16, 2008, and the pending dispositive motions
14 were re-noted on the Court's calendar for consideration.

15 At the time the City defendants filed their motion to dismiss, plaintiff had not missed any
16 Court deadlines nor had he taken any actions to impeded the litigation. Plaintiff did not conduct any
17 discovery, but he was under no obligation to do so. Defendants maintain that plaintiff was aware that
18 he had an obligation to move his case toward trial because a motion to dismiss for failure to
19 prosecute had been filed in another of plaintiff's lawsuits, C07-777-RSM. However, a review of the
20 Court's records does not reveal that any such motion was ever filed in C07-777-RSM. The document
21 which defendants appear to rely on to support their argument is, in fact, a motion for summary
22 judgment and dismissal which was filed by the King County Prosecuting Attorney's Office in cause

23
24 ⁴ Defendant Wilks' motion papers revealed that on April 25, 2008, the King County Superior
25 Court issued an Order finding plaintiff incompetent to stand trial in that court and committing
26 plaintiff to Western State Hospital for further evaluation and treatment. (*See* Dkt. No. 16, Ex. C.)

1 number C07-777-RSM in January 2008. (*See* Dkt. No. 27, Ex. I.) This Court was unable to identify
2 in the referenced document any argument that defendants were entitled to dismissal based upon
3 plaintiff's failure to prosecute. Finally, the fact that plaintiff has not prevailed on any of his
4 previously filed actions does not, in this Court's view, weigh in favor of imposing the ultimate
5 sanction of dismissal in this one.

6 The City defendants have not established that they are entitled to dismissal of this action, with
7 prejudice, based upon plaintiff's failure to prosecute. Accordingly, the City defendants' motion to
8 dismiss should be denied. The Court will now turn to consideration of the City defendants' motion
9 for summary judgment.

10 Summary Judgment

11 Summary judgment is appropriate when, viewing the evidence in the light most favorable to
12 the nonmoving party, there exists "no genuine issue as to any material fact" such that "the moving
13 party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is a fact
14 relevant to the outcome of the pending action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
15 248 (1986). Genuine issues of material fact are those for which the evidence is such that "a
16 reasonable jury could return a verdict for the nonmoving party." *Id.*

17 In response to a properly supported summary judgment motion, the nonmoving party may not
18 rest upon mere allegations or denials in the pleadings, but must set forth specific facts demonstrating
19 a genuine issue of fact for trial and produce evidence sufficient to establish the existence of the
20 elements essential to his case. *See* Fed. R. Civ. P. 56(e).

21 ***1. Officers O'Cleary and Lang***

22 Plaintiff's claims against defendants O'Cleary and Lang arise out of an incident which
23 occurred on August 26, 2007. Plaintiff states that on that date, defendants O'Cleary and Lang came
24 to his "tent-camp" located at South Main Street and Alaskan Way South in Seattle. Plaintiff asserts
25

1 that when defendants arrived at his camp, they kicked his girlfriend out of the tent, they then entered
2 the tent and “did an illegal search and seizure,” they removed his personal belongings from the tent,
3 and they tore the tent down.⁵ Plaintiff asserts that after his tent was dismantled, defendant O’Cleary
4 advised him that he was under arrest for criminal trespassing. According to plaintiff, he was standing
5 with his hands on the hood of defendant O’Cleary’s patrol car when defendant Lang proceeded to
6 handcuff him. Plaintiff contends that as defendant Lang put the handcuffs on his right wrist, she dug
7 the cuff into an open wound causing him extreme pain and suffering. Plaintiff asserts that the actions
8 of defendants O’Cleary and Lang violated his rights under the Fourth and Eighth Amendments to the
9 United States Constitution, as well as his rights under the Washington State Constitution.

10 Defendants O’Cleary and Lang argue that they are entitled to summary judgment because
11 they met Fourth Amendment requirements in conducting their investigative stop of plaintiff on the
12 date in question. The Fourth Amendment guarantees that individuals will not be subjected to
13 unreasonable searches and seizures. The Supreme Court has held that a police officer may,
14 consistent with Fourth Amendment principles, conduct a brief investigatory stop when the officer has
15 a reasonable, articulable suspicion that a person has committed or is about to commit a crime. *Terry*
16 *v. Ohio*, 392 U.S. 1, 30 (1968).

17 In *Terry*, the Supreme Court established a framework for evaluating the reasonableness of an
18 investigatory stop. The Supreme Court identifies the relevant inquiry as “whether the officer’s action
19 was justified at its inception, and whether it was reasonably related in scope to the circumstances
20 which justified the interference in the first place.” *Id.*, at 20. In *Florida v. Royer*, 460 U.S. 491

21
22 ⁵ In his complaint, plaintiff offers two slightly different descriptions of what happened to his
23 property. In the statement of his claim against defendant O’Cleary, plaintiff asserts that his personal
24 belongings were thrown onto the sidewalk next to the dismantled tent. (*See* Dkt. No. 7 at 7.) In the
25 statement of his claim against defendant Lang, plaintiff asserts that his belongings were thrown over
a fence and into an adjacent parking lot, and that he was advised by defendant O’Cleary that he
would have to call the Harbor Patrol in order to get his belongings back. (*See id.* at 9-10.)

1 (1983), the Supreme Court, relying on the framework established in *Terry*, explained that the scope
2 of an investigative detention “must be carefully tailored to its underlying justification . . . , and [may]
3 last no longer than is necessary to effectuate the purpose of the stop.” *Id.*, at 500.

4 The City defendants offer in support of their motion for summary judgment the declarations
5 of defendants O’Cleary and Lang. Defendants state that at around 12:04 p.m. on August 26, 2007,
6 they responded to South Main Street and Alaskan Way South on a citizen report that a male who was
7 camped out at that location was defecating in public.⁶ (*See* Dkt. No. 29 at 1 and Dkt. No. 30 at 1.)
8 According to defendant O’Cleary, when she received that call, she was aware that the description of
9 the suspect matched that of an individual who had previously camped out at the same location and
10 who had previously been warned by defendant O’Cleary that he would have to move from that
11 location because he was trespassing. (Dkt. No. 30 at 1-2.) That individual was plaintiff. (*Id.*)

12 Defendant O’Cleary states that when she arrived at the camp, she observed plaintiff standing
13 on the sidewalk next to his tent. (*Id.* at 2.) She asked plaintiff if he remembered her previous
14 warning to move from the location and he indicated that he did and that he would pile his belongings
15 into his cart – a Safeway shopping cart – and go. (*Id.*) Defendant O’Cleary states that because
16 plaintiff had previously threatened to kill police officers as well as citizens, she felt that safety
17 concerns warranted securing plaintiff in handcuffs in the back of her squad car until a sergeant could
18 arrive to screen the incident. (*Id.*) After securing plaintiff, she advised him that he was being
19 arrested for trespassing and for possession of stolen property. (*Id.*) Defendant O’Cleary states that
20 plaintiff was interviewed and released after the sergeant arrived at the scene. (*Id.*)

21
22
23
24 ⁶ This was the second of three contacts police had with plaintiff on August 26, 2007. The
25 third contact, which occurred at approximately 2:00 p.m. that afternoon, resulted in plaintiff being
26 booked into the KCCF for investigation of harassment. (*See* Dkt. No. 27, Ex. E.)

1 Defendant Lang, in her declaration, essentially reiterates that defendant O’Cleary recognized
2 plaintiff from a prior contact, that they handcuffed plaintiff because they feared he could become
3 violent given his prior threats against police officers and citizens, and that he was interviewed and
4 released after the sergeant arrived to screen the incident. (*See* Dkt. No. 29.)

5 Defendants argue that because of plaintiff’s continued presence at a camp he was previously
6 directed to vacate, as well as the conduct described in the citizen report, they had sufficient grounds
7 to briefly detain plaintiff and investigate. Defendants further argue that they had the right to secure
8 plaintiff during the course of the brief detention because defendant O’Cleary recalled plaintiff
9 threatening to kill officers and other citizens in her previous contacts with him. The evidence
10 provided by defendants supports their assertion that they were justified in detaining plaintiff and in
11 securing him for their own safety. Plaintiff provides no evidence to refute that presented by
12 defendants. Accordingly, defendants O’Cleary and Lang are entitled to summary judgment with
13 respect to plaintiff’s claim that these defendants violated his Fourth Amendment rights when they
14 detained him on August 26, 2007.

15 Plaintiff’s claim that defendants O’Cleary and Lang violated his Fourth Amendment rights
16 when they conducted an illegal search and seizure of his tent, and plaintiff’s claim that defendant
17 Lang used excessive force when handcuffing him, remain in this action as defendants presented no
18 argument directed to these claim in their summary judgment motion.

19 **2. Officer Fox**

20 Plaintiff’s claims against defendant Fox arise out of an incident which occurred on August 24,
21 2007. Plaintiff alleges that on that date, defendant Fox threatened to arrest him if he did not turn over
22 a guitar case that was in his possession to another individual who claimed that plaintiff had stolen the
23 guitar case from him. Plaintiff further alleges that defendant Fox violated his rights when defendant
24 Fox told him he could not go to Occidental Park as he had intended to do, and ordered plaintiff

1 instead to take his belongings and go under the viaduct. Plaintiff maintains that the camp he set up
2 under the viaduct, in accordance with defendant Fox's directive, was the camp later destroyed by
3 defendants O'Cleary and Lang.

4 Defendant Fox argues that he is entitled to summary judgment because plaintiff has not
5 alleged a viable cause of action against him under § 1983. In order to sustain a cause of action under
6 42 U.S.C. §1983, a plaintiff must show (i) that he suffered a violation of rights protected by the
7 Constitution or created by federal statute, and (ii) that the violation was proximately caused by a
8 person acting under color of state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).
9 The causation requirement of § 1983 is satisfied only if a plaintiff demonstrates that a defendant did
10 an affirmative act, participated in another's affirmative act, or omitted to perform an act which he was
11 legally required to do that caused the deprivation complained of. *Arnold v. IBM*, 637 F.2d 1350,
12 1355 (9th Cir. 1981) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

13 Defendant Fox acknowledges that he made contact with plaintiff on August 24, 2007, but he
14 does not describe that nature of that contact. Defendant Fox does, however, state in his declaration
15 offered in support of the City defendants' summary judgment motion that he did not instruct plaintiff
16 to set up camp underneath the viaduct on August 24, 2007. Plaintiff offers no evidence to the
17 contrary. Accordingly, defendant Fox is entitled to summary judgment with respect to that claim.

18 Defendant Fox does not address plaintiff's claim that he threatened to arrest plaintiff if
19 plaintiff did not give another man his guitar case. This assertion, at most, amounts to a claim that
20 defendant Fox unlawfully deprived plaintiff of his personal property. The Due Process Clause
21 provides that no person shall be deprived of "life, liberty, or property, without due process of law."
22 U.S. Const. Amend. V. However, where a state employee's random, unauthorized act deprives an
23 individual of property, either negligently or intentionally, the individual is relegated to his state post-
24 deprivation process, so long as the state provides an adequate post-deprivation remedy. *Hudson v.*

1 *Palmer*, 468 U.S. 517, 533 (1984); *Parratt v. Taylor*, 451 U.S. 527, 540-41 (1981), *overruled on*
2 *other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

3 Washington State provides a post-deprivation remedy for the alleged tortious conduct of city
4 and county employees' under RCW 4.96. Plaintiff does not allege any due process inadequacy in the
5 tort remedy provided under RCW 4.96. Thus, plaintiff has not alleged a viable claim for relief with
6 respect to the loss of his personal property. Plaintiff's complaint should therefore be dismissed with
7 respect to his claim concerning the guitar case.

8 Exhaustion of Administrative Remedies

9 Plaintiff alleges that Sergeant Wilks violated his rights under the federal constitution when,
10 on August 26, 2007, she ordered that plaintiff be "dressed-out" in a white ultra-security uniform upon
11 being booked into the KCCF. Plaintiff further asserts that during the course of his incarceration at
12 KCCF, he was denied clothes, bedding, personal hygiene items, hot meals and fresh drinking water
13 as a direct result of Sergeant Wilks' actions, and that Sergeant Wilks "raided" and improperly
14 removed items from his cell while he was at an attorney visit. Sergeant Wilks argues that plaintiff's
15 claims against her should be dismissed because plaintiff failed to exhaust his administrative
16 remedies.

17 Section 1997e(a) of Title 42 of the United States Code provides that "[n]o action shall be
18 brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by
19 a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies
20 as are available are exhausted." 42 U.S.C. § 1997e(a). Section 1997e(a) requires *complete*
21 exhaustion through any available process. *See Porter v. Nussle* 534 U.S. 516, 524 (2002) ("All
22 'available' remedies must now be exhausted."); *Booth v. Churner*, 532 U.S. 731, 735 (2001).

23 If administrative remedies have not been exhausted at the time an action is brought, it must be
24 dismissed without prejudice. *See McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002)(per
25

1 curiam). “In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court
2 may look beyond the pleadings and decide disputed issues of fact. If the district court concludes that
3 the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim
4 without prejudice.” *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003)(citations and footnote
5 omitted).

6 The KCCF has a grievance procedure through which inmates may seek review of various
7 aspects of their imprisonment. (*See* Dkt. No. 35 at 3.) The KCCF process involves first attempting
8 to resolve complaints with the staff member who is immediately involved in the issue. (*Id.*) If this
9 informal attempt at resolution is unsuccessful, an inmate may file a grievance in which he identifies
10 his specific complaint as well as the resolution being sought. (*See id.* at 3 and Exs. A-C.) Finally, if
11 an inmate does not agree with the manner in which the grievance was resolved, the inmate may
12 appeal. (*Id.*) The grievance process is not deemed complete unless the inmate pursues an appeal.
13 (*See* Dkt. No. 32 at 6.)

14 The record before this Court reflects that plaintiff filed a number of grievances regarding the
15 conditions of his confinement during the time period relevant to the claims set forth in the instant
16 action. It appears that each of those grievances was responded to by a staff member, but it does not
17 appear that plaintiff ever appealed any of the responses he received. Plaintiff therefore failed to fully
18 exhaust the grievance process with respect to the grievances he filed and, thus, all of his claims
19 against defendant Wilks must be dismissed.

20 CONCLUSION

21 Based on the foregoing, this Court recommends that the City defendants’ motion to dismiss
22 for failure to prosecute be denied and that the City defendants’ motion for summary judgment be
23 granted as to plaintiff’s claim that defendants O’Cleary and Lang violated his Fourth Amendment
24 rights when they detained him on August 26, 2007, and as to all claims asserted against defendant
25

1 Fox. Plaintiff's complaint should be dismissed with prejudice as to each of those claims. This Court
2 further recommends that defendant Wilks' motion to dismiss for failure to exhaust administrative
3 remedies be granted. Plaintiff's complaint be dismissed without prejudice as to all claims asserted
4 against defendant Wilks. Plaintiff's claim that defendants O'Cleary and Lang violated his Fourth
5 Amendment rights when they conducted an illegal search and seizure of his tent, and plaintiff's claim
6 that defendant Lang used excessive force when handcuffing him, remain for resolution at trial. A
7 proposed order accompanies this Report and Recommendation.

8 DATED this 22nd day of January, 2009.

9
10 
11 JAMES P. DONOHUE
United States Magistrate Judge